STATE OF MICHIGAN

COURT OF APPEALS

BENZIE COUNTY ROAD COMMISSION,

Plaintiff-Appellee,

V

JANINE M. BAKER, *et al*.,

Defendants,

and

ROGER K. SMITH and ELIZABETH SMITH,

Defendants-Appellants.

UNPUBLISHED
November 26, 2002

No. 230217
Benzie Circuit Court
LC No. 96-4744-CH

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order finding that 7th Street was dedicated as a public road pursuant to the plats of Government Lots 5 and 6, and granting summary disposition to plaintiff pursuant to MCR 2.116(I)(2). We reverse.

I. Facts and Proceedings

In 1927, the Assessor's Plat of Beuna Gloria, Government Lot 5, Section 14, T 25 N, R 16 West (Lot 5), was approved by both the Benzie County Board[1] and the Blaine Township Board. The Lot 5 plat indicated that 7th Street was sixteen feet wide. The dedication section of the Lot 5 plat specifically stated that "the streets and alley as shown on said plat are hereby dedicated to the use of the public." On March 29, 1940, plaintiff Benzie County Board of County Road Commissioners, pursuant to their authority under the McNitt Act, 1939 PA 36,[2]

[1] It is not entirely clear whether the approval was by the County Board of Commissioners or the County Board of County Road Commissioners.

[2] The McNitt, 1931 PA 130, as amended by 1939 PA 36, repealed by 1951 PA 51, § 21 provided, in part:

> The state highway commission shall, jointly with the board of county road

(continued…)

passed a resolution of certification, indicating that plaintiff was taking over certain roads in order to make them part of the county road system. Among the roads taken over was 7th Street, which the resolution indicated was within the Lot 5 plat. Indeed, the record contains a map showing 7th Street as a certified county local road.

In 1948,[3] a survey was completed of Government Lot 6. That plat shows that 7th Street is twenty feet wide.[4] Unlike the Lot 5 plat that contained public dedication language, the Lot 6 plat did not expressly dedicate the streets and alleys shown to the public. Rather, the Lot 6 plat simply stated that "the streets and alleys as shown on said plat are now being used for such purposes." In January 1951, Mr. Sievart Glarum, Sr., whose family was apparently the original owner of Lot 6, wrote a letter to Benzie County Clerk Rufus Putney asserting the existence of several errors in the Lot 6 plat. Glarum contended that several access ways on the plat were in fact easements over private property, not public streets as shown on the plat. According to Glarum's letter, the platting of 7th Street was among the asserted errors. Specifically with respect to 7th Street, the letter stated in part:

> In view of the fact that the Assessor's Plot [sic] does not agree with the deeds that we hold to property in this area, we hereby formally request that the following parcels of land in this general area, to which we hold title, be assessed to us described by metes and bounds until the Assessor's Plot [sic] is brought in conformance with the deeds.
>
> Parcel 1. A strip of land 20 feet in width along the east side of this area to the water [sic] edge.
>
> * * *

(…continued)

> commissioners of each county . . . , ascertain and fix the total mileage of roads in each county of the state in actual use for public travel . . . including dedicated streets and alleys in recorded plats outside of incorporated cities and villages as of July 1, 1939, and as of April 1 of every second year thereafter, and not later than December 1, 1939, and July 1 of every second year thereafter, he shall determine and certify to the board of supervisors and the board of county road commissioners of each of the several counties of the state the total mileage of such county roads in actual use for public travel taken over as county roads . . . including streets and alleys in recorded plats, for each of the several counties of the state, together with the total of all such mileage in the state.

[3] It appears that some the approvals for this plat occurred in 1949; however, for ease of reference, because the plat was surveyed and certified in 1948, we will refer to that year throughout this opinion.

[4] Although the Lot 5 plat shows that 7th Street is a sixteen feet wide and the Lot 6 plat shows that it is twenty feet wide, it is undisputed that 7th Street is, in actuality, twenty-eight feet wide. Thus, while not shown as such on the two plats, it is apparent that eight feet of 7th Street actually overlaps both Lot 5 and Lot 6. The dispute in this case concerns how much of that twenty-eight feet is public road.

> We shall be willing to dedicate roadway areas in suitable location[s] by due processes when so requested.

Glarum received a return receipt indicating that Putney had received the letter. Subsequently, Glarum recorded a copy of his letter to Putney, as well as the return receipt, in Liber 1154, page 576-577, Benzie County Register of Deeds, on July 29, 1974.

Other dealings between Glarum and plaintiff demonstrate Glarum's assertion of ownership over the disputed 20-foot portion of 7th Street. On March 4, 1976, James Thompson (Engineer-Manager for plaintiff) "accepted" a purported grant of permission to plaintiff by Glarum "to deposit snow from the plowing of Buena Road and 7th Street of the Assessor's Plat of Beuna Gloria at the north side of the private road extending west of the intersection of Pine Street and 7th Street of said plat." The document from Glarum further indicated that "the snow must be deposited within 100 feet of the above intersection and placed so that it does not interfere with the passage of automobiles on the private road." In addition, a March 2, 1989 handwritten memo from Dave Mead (Mead was apparently the township supervisor at the time) to Glarum stated that he has "ask[ed] the [Equalization] Dept. [Benzie County] to make the necessary change's [sic]."[5]

On October 2, 1984,[6] Glarum deeded the 20-foot portion of Lot 6 commonly referred to as 7th Street to defendants Roger and Elizabeth Smith ("defendants"). This deed was recorded in Liber 204, Page 275, Benzie County Register of Deeds. It is undisputed that defendants have continuously paid property taxes on this strip of land since they became record owners to the present time.

In 1993, plaintiff began to install public access signs on roads that accessed lakes within Benzie County, including 7th Street. Later that year, plaintiff decided to expand and improve 7th Street from Pine Street south to the water's edge. Plaintiff also developed a plan to construct a road sixteen feet wide, with the centerline being the center of the 28-foot right of way encompassing both the 7th Street located in Lot 5 and the 7th Street located in Lot 6.

On April 8, 1996, plaintiff filed the instant complaint against defendants seeking a declaratory order determining whether 7th Street is a public road under plaintiff's jurisdiction, and further determining the dimensions of 7th Street, and plaintiff's maintenance responsibilities. Plaintiff alleged that the Lot 5 plat specifically designated 7th Street as a public road right-of-way, across its westerly 8 feet; that the streets and alleys shown on the plat were dedicated for public use; and that all roads shown on the Lot 5 plat come under plaintiff's jurisdiction by virtue of its March 29, 1940 McNitt Act resolution. Plaintiff also alleged that the Lot 6 plat included a 20-foot right-of-way along the east boundary, designated as 7th Street, and that because the Lot 6

---

[5] While defendants rely on this memo to support their claim that the 20-foot strip of 7th Street is a private road, on its face the memo does not describe what changes Mead is discussing.

[6] Although defendants consistently refer to October 4, 1984 as the date the deed was recorded, a review of the exhibits clearly indicates that the deed to the property was recorded on October 2, 1984.

dedication states that "the streets and alleys as shown on the plat are now being used for such purposes," "title to the property underlying 7th Street in said plats is or may be in plaintiff."

Alternatively, plaintiff asserted that the westerly eight feet of 7th Street (Lot 5) and the easterly 20 feet of 7th Street (Lot 6) together constitute a strip of property twenty-eight feet wide that was accepted by plaintiff into its jurisdiction and that the 20-foot disputed portion of 7th Street was a public road by virtue of the highway by user statute, MCL 220.21.

Defendants denied that the 20-foot portion of 7th Street was designated to the public either formally or informally and that the 20-foot strip of land had become a public road under the highway by user statute. Defendants subsequently moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the undisputed material facts clearly established that the disputed portion of 7th Street was private. In addition to claiming that acceptance had not occurred and the highway by user statute did not apply, defendants contended that the private character of the road was evident from the numerous private easements that defendants and their predecessors provided to landowners for ingress and egress to their property by foot. Defendants argued in the alternative that even if there had been a public dedication of the land, the offer had been rescinded before plaintiff ever accepted the offer. Defendants also challenged plaintiff's contention that the disputed portion of the road went all the way to the water's edge, as opposed to Lakeshore Drive, an undisputed private perpendicular road intersecting 7th Street before the lake. Further, relying on plaintiff's improvement plan for 7th Street, defendants pointed out that the road was completely covered with trees and impassable to motor vehicle traffic. Plaintiff responded to defendants' motion for summary disposition with several affidavits from members of the public showing that the public had used 7th Street for ingress and egress to the lake.

The trial court found that no genuine issue of material fact existed and that based on the Lot 5 and Lot 6 plats, 7th Street was a public road that is 28 feet wide running from Pine Street to Herring Lake. Accordingly, the court granted summary disposition to plaintiff pursuant to MCR 2.116(I)(2). This appeal followed.

II. Standard of Review

This Court reviews a trial court's grant of a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

III. Analysis

Defendants first argue that the trial court erred by granting summary disposition in favor of plaintiff and finding that 7th Street, as located in Lot 6, was a public, rather than a private, road. We agree, and find that defendants' motion for summary disposition should have been granted instead. A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis underlying a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). We consider all relevant documentary evidence in a light most favorable to the nonmoving party. *Id*.; *Ardt*, *supra*. Summary disposition under MCR 2.116(C)(10) is proper only when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. In addition, summary disposition is proper under MCR 2.116(I)(2) when it appears to the court that that nonmoving party, rather than the moving party, is entitled to

judgment as a matter of law. *Sharper Image v Dep't of Treasury*, 216 Mich App 698, 701; 550 N.W.2d 596 (1996).

Further, in an action to quiet title, the plaintiff has the burden of proof and must make out a prima facie case of title. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmett Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999), citing *Stinebaugh v Bristol*, 132 Mich App 311, 316; 347 NW2d 219 (1984). If the plaintiff establishes a prima facie case, the burden of proof shifts to the defendant to establish that defendant has superior right or title to the property. *Beulah*, *supra*, citing *Boekeloo v Kuschinski*, 117 Mich App 619, 629; 324 NW2d 104 (1982).

In *Christiansen v Gerrish Twp*, 239 Mich App 380, 383, 384; 608 NW2d 83 (2000), this Court restated the required elements of a dedication of land for a public purpose:

> The general rule regarding the dedication of land for a public purpose was set forth by the Michigan Supreme Court in *Kraus v Dep't of Commerce*, 451 Mich 420, 424; 547 NW2d 870 (1996). As stated in *Kraus*, a valid dedication requires two elements: (1) a recorded plat clearly offering the land for public use and (2) a subsequent acceptance of the offer by a public authority. *Id*. The acceptance must be timely, and it must be accomplished by a public act "'either formally confirming or accepting the [offer of] dedication, and ordering the opening of such street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation.'" *Id*., quoting *Tillman v People*, 12 Mich 401, 405 (1864). [*Christiansen, supra* at 383-384.]

Here, plaintiff contends that 7th Street was offered for public use in the Lot 5 plat, which was recorded in 1927, and that it was formally accepted by the resolution of certification on March 29, 1940. However, defendants do not challenge the assertion that the Lot 5 portion of 7th Street is public. Instead, they argue that there was never a formal dedication of the portion of 7th Street located within the Lot 6 plat and that this part of the street remained private.

As stated in *Beulah*, *supra* at 554, a common law public dedication of land requires "the intent of the property owners to offer the land for public use." Additionally, a public dedication in a recorded plat must evince "a clear intent by the plat proprietor to dedicate those areas to public use." *Marx v Dep't of Commerce*, 220 Mich App 66, 73; 558 NW2d 460 (1996). "To accomplish dedication, the property owner's intent must be unequivocal." *Martin v Redmond*, 248 Mich App 59, 66; 638 NW2d 142 (2001). See also *Kraus, supra* at 424; *Beulah*, *supra* at 554. In the instant case, the evidence indicates that Lot 6 was at all relevant times owned by the Glarum family, but the Lot 6 plat does not clearly indicate that 7th Street was ever "clearly offered" for public use by the Glarums or defendants. To the contrary, the evidence shows that the Glarums took steps to ensure that 7th Street was not considered a public road. Accordingly, we conclude that the Lot 5 plat dedicated only the portion of 7th Street actually located within Lot 5. Moreover, the Lot 6 plat does not evince a clear, unequivocal intent on the part of the proprietor of Lot 6 to dedicate the 20-foot portion of land to the public. Instead, the plat merely states that all streets and alleys "are now being used for such purposes." Therefore, we further

conclude that the evidence did not demonstrate as a matter of law that the 20-foot portion of 7th Street located in the Lot 6 plat was dedicated for public use.[7]

Even assuming that there was a valid dedication of 7th Street by the Lot 5 plat, the only "acceptance" of the dedication by plaintiff in the instant case was the McNitt Act resolution of March 29, 1940. In order for a McNitt Act resolution to suffice as evidence of a formal acceptance of a dedication, the resolution must, at a minimum, "expressly identif[y] the street in question." *Christiansen*, *supra* at 390. See also *Marx*, *supra* at 72, citing *Kraus*, *supra* at 430 (a McNitt Act resolution "that did not expressly identify either the platted road in dispute or the recorded plat in which the road was dedicated was insufficient to effect manifest acceptance of the offer to dedicate the road to public use"). Here, the resolution explicitly referred to 7th Street as located in the Lot 5 plat, but did not state that the acceptance pertained to any portion of 7th Street not located within the Lot 5 plat. Further, because the resolution was passed eight years before Lot 6 was platted, it is evident that the resolution did not accept a 20-foot portion of land that was within an unrecorded plat of land adjacent to Lot 5. Nothing in the record suggests that plaintiff subsequently altered the resolution to include portions of 7th Street not located within the Lot 5 plat. Accordingly, we conclude that even if the Lot 6 plat dedicated 7th Street to public use, as a matter of law plaintiff did not formally accept the dedication.

The actions by Glarum and defendants are also evidence that any offer to dedicate the street as a public road was withdrawn before there could be acceptance by plaintiff. For example, the 1951 Glarum letter that was recorded in 1974 is clearly an indication that any offer of dedication that may have been made was withdrawn. Additionally, the record contains evidence that defendants and their predecessors in title used the land in ways contradicting a public dedication. Specifically, Glarum sold the land to defendants, defendants and their predecessors granted easements for ingress and egress, the 20-foot portion of land was heavily wooded, and defendants and their predecessors consistently paid taxes on the land. All of these acts are inconsistent with a dedication to the public. See *Beulah*, *supra* at 551 (allowing trees to grow on land is viewed as inconsistent with public use); *Douthett v Walkotten*, 335 Mich 612, 618; 56 NW2d 399 (1953), and 7 ALR5th 187, § 10c, n 77 (1992) (the payment of taxes and the listing of the land as private property is of some significance in deciding whether the land was viewed as inconsistent with public use); *Martin*, *supra* at 67 (the act of the land being taxed and sold indicates the original owner's intent to withdraw dedication); see also *Kraus*, *supra* at 431 (inconsistent use depends on circumstances of each case), and *Marx*, *supra* at 80. Further, plaintiff acquiesced in the use of the land by defendants and their predecessors from at least 1948 until 1993. Acquiescence by one party to the other party's use of the property will often be

---

[7] Indeed, in *Bain v Fry*, 352 Mich 299, 304; 89 NW2d 485 (1958), the Court stated:

> Plaintiff's contention that the action of the city assessor in his certificate attached to the recorded assessor's plat No. 122 to the effect that the streets and alleys . . . "are not being used for such purposes" was sufficient to create an acceptance by the city of Pontiac is not supported. The trial court correctly held that the action of the city assessor in his certificate attached to the recorded assessor's plat No. 122 was *not sufficient to create an acceptance by the city of Pontiac*. . . .

pivotal in determining whether the dedication has been withdrawn. See *Kraus*, *supra*, citing *Tillman*, *supra* at 404.

Moreover, we find that the road never became public through either informal acceptance or application of the highway by user statute. With regard to informal dedication, the record reflects that plaintiff did nothing to improve or maintain the disputed portion of the property. It also establishes that plaintiff had previously accepted permission from Glarum to dump plowed snow on Lot 6. That document clearly indicated that Glarum considered the 20-foot portion of 7th Street found on his land to be a private road. While the document in itself cannot create a private right in 7th Street, it does indicate that Glarum continuously viewed the road to be private and that plaintiff did not disagree with Glarum's characterization of the road as private. In addition, because the 20 foot portion of land has been continually taxed and the record is devoid of any evidence to show that plaintiff exercised authority over the portion of 7th Street north of Pine Street before the withdrawal of the dedication,[8] it is apparent that plaintiff never informally accepted the road. See *Martin*, *supra* at 67, citing *Marx*, *supra* at 77.

Further, to establish a public highway pursuant to the highway by user statute, MCL 221.20, plaintiff must establish (1) a defined line of travel, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use. *Beulah*, *supra* at 554-555, citing *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958); see also *Cimock v Conklin*, 233 Mich App 79, 87; 592 NW2d 401 (1998). In *Cimock*, this Court stated that

> a plain understanding of the requirement of a roadway that has been "'traveled upon by the public for ten consecutive years,'" [*Kentwood v Sommerdyke Estate*, 458 Mich 642, 666; 581 NW2d 670 (1998)], would require extensive use of the roadway by individual members of the public for their varied purposes, not merely use by a governmental entity. . . . A common understanding of the term "highway," . . . includes use of a stretch of road by the *public at large*. [*Cimock*, *supra* at 87-88.]

Here, plaintiff's evidence of public use consists solely of affidavits from members of the public indicating that they used 7th Street for ingress and egress access to Lower Herring Lake well in excess of the statutory ten-year period. However, nothing in the affidavits indicates that the individuals traveled the road for varied purposes; rather, they merely indicate that they used the road for lake access. In addition, nothing in the affidavits suggests that the individuals used vehicles on the road. This, coupled with plaintiff's admission that one cannot reach the beach from 7th Street by vehicle, prohibits finding that there is a "defined line of travel with definite borders." *Cimock*, *supra* at 86. In fact, nothing in the affidavits indicates that the individuals traveled on defendants' 20-foot portion as opposed to the undisputed eight-foot portion that has been properly dedicated and accepted for public use.

---

[8] At best, the record establishes that plaintiff had plowed snow from 7th Street north of Pine Street for thirty years, or since 1966. Here, the evidence shows that Glarum used the 20-foot portion of land in a way inconsistent with public dedication since at least 1951.

Additionally, the actions by defendants' predecessors in interest, including granting easements, paying taxes, and selling the land, mitigate against finding that the 20-foot portion of land was being used in an open, notorious, and exclusive manner. *Id*. at 87 and 88, n 3; see also *Beulah*, *supra* at 556-557 and the cases cited therein, *Kalkaska Co Bd of Co Rd Comm'rs v Nolan*, 249 Mich App 399, 403; 643 NW2d 276 (2002) (finding in part that use was open and notorious because people using roads never requested permission to use them). Plaintiff's affidavits in no way suggest that the affiants did not have permission to use the 20-foot portion of 7th Street within defendants' property. See *Missaukee Lakes Land Co v Missaukee Co Rd Comm*, 333 Mich 372, 378-379; 53 NW2d 297 (1952), and *Bain*, *supra* at 305 (mere permissive use of a private road will not make it a public highway). Therefore, we conclude that even if plaintiff exercised control over all of 7th Street by plowing 7th Street north of Pine Street, see *DeFlyer v Bd of Co Rd Comm'rs of Oceana Co*, 374 Mich 397, 401; 132 NW2d 92 (1965), *Pulleyblank v Mason Co Rd Comm*, 350 Mich 223, 227; 86 NW2d 309 (1957), it is evident that genuine issues of material fact exist regarding the other four elements of the highway by user statute.

Because we find that the court improperly granted summary disposition to plaintiff, it is not necessary for us to discuss whether 7th Street runs to the water's edge.

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra